SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 391

JOSEPH BANCROFT & SONS CO.,
Petitioner,

v.

SHELLEY KNITTING MILLS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

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At page 2 of the Brief in Opposition, the respondent alleges that petitioner creates a mis-impression that there was a previous hearing at which some evidence had been submitted relevant to respondent's causes of action for conspiracy and abuse of process prior to these held in further-

ance of the District Court's Memorandum Opinion and Order of December 26, 1964. Petitioner submits that this is no "mis-impression" because, in fact, there was a previous hearing: the nineteen day trial during the early part of 1962. There were also two hearings pursuant to the Order of December 26, 1964, namely February 2, 1965 and February 17, 1965.

At the request of respondent's counsel, the District Court explained the import of its December 26, 1964 Opinion and Order at the "hearing" on February 2, 1965, as follows (R. 335a-336a):

> "Well, now, to attempt to amplify orally what was the intent of [the order of December 26, 1964]. . . .
>
> In view of my understanding of the law that it is this court's duty to note promptly any allegation of bad faith or abuse of this court's process, or attempt at its abuse, and since I think the law is clear that this court may not permit its process to be abused, . . .
>
> What I propose to do is to make specific findings in this case on those issues of abuse of process, bad faith, malicious abuse of process and conspiracy so to do in this court in relation to action 25092, which was before me.
>
> *"I realize I might have done that on the record which already existed.* However, I felt that some complaint might be made by one counsel or the other of want of notice of my intention so to do, or that one counsel or another may have felt that they were deprived of due process in some sense by being denied an opportunity to offer *additional* or *supplemental* evidence on those scores . . ." (Emphasis added)

Again, at the hearing of February 17, 1965, the court stated (R. 341a):

> "We have now inquired of counsel whether, responsive to our original memorandum and order [of December 26, 1964], either side desires to supplement the original trial record in this case by additional evidence, it being our intention to afford each of the parties the opportunity so to do if either wishes.
>
> "Both parties by their counsel have now indicated that neither party wishes to offer evidence additional to the present original record, in connection with the memorandum and order filed by this Court December 26, 1964.
>
> "Senator Shapiro, have I correctly stated the status and the developments in the proceedings?
>
> MR. SHAPIRO: You have, sir.
>
> THE COURT: Mr. Phillips?
>
> MR. PHILLIPS: Yes sir."

The Court is also referred to the District Court's opinion of September 2, 1965, wherein the court said:

> "In the course of the lengthy proceedings in the present case, Shelley's counsel, in the presence and hearing of the trial judge, repeatedly charged Bancroft with bad faith in the institution of the action and declared Shelley's intention to sue Bancroft for misuse of the Court's process. . . . mindful of our inherent *power and duty to prevent abuse of the Court's process*, 21 C. J. S. Courts, Sec. 88, p. 138, we gave serious and deliberate consideration to the question of Bancroft's motivation in bringing suit . . . our adjudication [December 26, 1962] in Ban-

croft's favor necessarily reflected our conclusion that Bancroft brought the action in good faith and with no ulterior motive." (Appendix B, p. 5a, emphasis added)

The opinion of the Court of Appeals takes no issue whatsoever with the factual statements of the District Court that it had heard these allegations during the trial, had considered them and had ruled against respondent in making its Adjudication of December 26, 1962.

ARGUMENT

The respondent's entire Brief in Opposition is directed to an argument that its charges of abuse of process and conspiracy were irrelevant to the *cause of action* before the District Court and that that is what the Third Circuit held in its opinion of March 8, 1967. The respondent also argues that the grounds asserted in the Petition for a Writ of Certiorari of the petitioner are nonexistant because petitioner fails to differentiate between a cause of action for malicious abuse of process and one for malicious use of process.

This misstates petitioner's position. It makes no difference whether the particular cause of action or defense is labeled one for abuse of process, misuse of process, malicious prosecution, waiver or estoppel. The important consideration is that the respondent at the trial of this action made the charges and adduced evidence to prove certain facts during the course of the trial. Respondent admits that it attempted to prove these facts to substantiate its defenses of waiver and estoppel.

There is no serious challenge to petitioner's position (and the District Court's opinion) that the underlying facts upon which the respondent based its case of waiver

and estoppel during the trial of the main action are the same as the underlying facts upon which it based its causes of action for malicious abuse of process and conspiracy in the state court. A comparison of the essential allegations of fact in respondent's Complaints in the state court (R. 297a-304a and R. 305a-309a) with the evidence adduced by respondent at the trial and the argument of respondent's counsel after the trial in its attempt to sustain the defenses of waiver and estoppel is set forth below:

Allegation	Trial Record
Petitioner had promised respondent certain financial and advertising assistance, but the promises were never intended to be kept. (R. 300a-301a)	R. 106a-109a, 133a, 163a and 193a
That a partial advance was made by petitioner, while repeating promises of further financial and advertising assistance. (R. 301a)	R. 194a, 203a
That petitioner attempted to persuade a prospective vendee not to buy respondent's sweaters. (R. 301a)	R. 119-123a, 197a
That the suit for trademark infringement, unfair competition and breach of contract was brought in bad faith to drive the respondent out of business. (R. 301a, 308a)	R. 33a, 73a, 195a-197a

The above shows that the new suits are an attempt to relitigate facts already tried and argued before the same District Court in which respondent's abuse of process action is now pending along with this action. Respondent's position then, is that the evidence which it adduced and which

it argued was conclusive in support of its defenses of waiver and estoppel was not and is not *relevant* in the trial of this action. Obviously respondent takes this position to avoid the effect of collateral estoppel and to nullify the benefit to the petitioner of the District Court's adjudication.

The constant repetition in the respondent's opposition brief that its actions were brought in the State Court does not change the fact that the abuse of process action was removed and is presently pending in the United States District Court for the Eastern District of Pennsylvania, the same Court in which the instant action is pending.

Clearly the additional findings and conclusions in this action are relevant to petitioner's right to a final judgment in this action. Contrary to respondent's assertions petitioner does distinguish between the action for misuse of process and abuse of process and the conflicts of decisions are clear. It is only when respondent laboriously reads "abuse" as really meaning "misuse" in those decisions that the cases upon which petitioner relies can be distinguished.

The conflict between the decision of the Court of Appeals and this Court's holding in *United States* v. *Powell*, 379 U. S. 48 (1964) and the Second Circuit's decisions in *Helene Curtis Industries, Inc.* v. *Sales Affiliates, Inc.*, 247 F. 2d 940 (2d Cir. 1957) and *Sperry Rand Corp.* v. *Rothlein*, 288 F. 2d 245 (2d Cir. 1961) is clear and can only be resolved by this Court.

CONCLUSION

The "theme" of petitioner's reasons for seeking this writ is repeated throughout the petition. The "discord" is between the District Court's proper discharge of its duty consistent with sound law and the opinion of the Court of Appeals which ignores sound judicial principles and established law. This Court should remove as a precedent the decision of the Court of Appeals.

Respondent's opposition highlights the importance to the Federal Judicial System that these current and critical issues be resolved by this Court.

Respectfully submitted,

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